No. 95-1666

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

BABCOCK & WILCOX COMPANY,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO,

Respondent.

MATSON NAVIGATION COMPANY, INC., WATTERS MARINE, INC., WEYERHAEUSER COMPANY (IMPROPERLY NAMED AS F.E. WEYERHAEUSER), HEUBLEIN, INC. (AS SUCCESSOR IN INTEREST TO UNITED VINTNERS, INC.), AMERICAN PRESIDENT LINES, LTD. and MOBIL OIL CORPORATION,

Real Parties In Interest For Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether the California Court of Appeals correctly refused to grant extraordinary relief to require a state trial court to reverse an interlocutory, pretrial denial of a third-party defendant's motion for summary judgment on general maritime law indemnity claims.

STATEMENT OF INTERESTED PARTIES

Pursuant to Rule 29.6, Rules of the Supreme Court of the United States, real parties in interest on behalf of respondent make the following disclosures:

1. American President Lines, Ltd. is a subsidiary of American President Companies, Ltd. The following entities are partially but not wholly owned subsidiaries of American President Lines, Ltd.: American President Lines (Lanka) Agencies Limited; APL Agencies Sdn.Bhd.; APC (Bangladesh) Agencies Limited; Global Alliance F, Ltd.; Multimodal Transport International (Pvt) Ltd.; and Pisces, Limited Liability Company.

2. Heublein, Inc. is the successor in interest to United Vintners, Inc. United Vintners, Inc. is a dissolved California corporation with no subsidiaries. Heublein, Inc. is a subsidiary of Grand Metropolitan P.L.C. The following entities are partially but not wholly owned subsidiaries of Heublein, Inc.: Austin Nichols Do Brasil, Inc.; Boulevard Distillers & Importers, Inc.; J.M. da Fonseca Exportador; Madera Glass Company; The Pierre Smirnoff Co. Ltd.; Heublin Industria E Comercio Ltda.; Heublein (Japan) Limited; and St. Pierre Smirnoff FLS (Canada) Limited.

3. Matson Navigation Company, Inc. is a subsidiary of Alexander & Baldwin, Inc. Matson Navigation Company, Inc. has no subsidiaries that are not wholly owned.

4. Mobil Oil Corporation is a subsidiary of Mobil Corporation. The following entities are partially but not wholly owned subsidiaries of Mobil Oil Corporation: Atas Anadolu Tasfiyehanesi A.S.; Canner's Steam Company, Inc.; Collins Pipeline Company; Felix Oil Company; Mobil Gas Services

Inc.; Mobil Oil de Mexico, S.A. de C.V.; Mobil Oil del Peru (Compania Comercial) S.A.; Mobil Oil Guinee; Mobil Oil Mauritanie; Mobil Oil Nigeria Public Limited Company; Mobil Tunisie; Near East Development Corporation; and T&M Terminal Company.

5. Watters Marine, Inc. has no parent and no subsidiaries.

6. West Coast Shipping Company is a subsidiary of Union Oil Company of California. West Coast Shipping Company has no subsidiaries.

7. Weyerhaeuser Company has no parent. The following entities are partially but not wholly owned subsidiaries of Weyerhaeuser Company: Mountain Tree Farm Company; North Pacific Paper Corporation; and Pacific Veneer, Ltd.

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OPINIONS BELOW

No written opinions have been issued in any of the proceedings below.

The respondent Superior Court of the State of California, County of San Francisco, entered a two-paragraph interlocutory Order, unaccompanied by an opinion, on August 24, 1995, denying petitioner's motion for summary judgment or, in the alternative, for summary adjudication, in the underlying personal injury action, *Abdel H. Osman v. Matson Navigation Company, Inc., et al.*, No. 961120. The Order of the California Superior Court is reproduced at Appendix A to the petition for certiorari.

The underlying *Osman* personal injury action has not yet been scheduled for trial, and no judgment has been rendered in that action.

On November 22, 1995, the Court of Appeal of the State of California, First Appellate Division, entered a two-sentence Order, unaccompanied by an opinion, denying petitioner's petition for peremptory or alternative writ of mandate and for a stay, thereby refusing to direct the trial court to reverse its pre-trial ruling denying petitioner's motion for summary judgment. The Order of the California Court of Appeal is reproduced at Appendix B to the petition for certiorari.

On January 17, 1996, the Supreme Court of California entered a one-sentence order, unaccompanied by an opinion, denying petitioner's application for stay and petition for review. The Order of the California Supreme Court is reproduced at Appendix C to the petition for certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case does not involve interpretation of any constitutional provisions or federal or state statutes.

However, questions concerning this Court's jurisdiction may involve interpretation of 28 U.S.C. § 1257(a), which states:

> **§ 1257. State courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF JURISDICTION

The Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review the interlocutory Order of the California Superior Court (and thereby reach the underlying general maritime law issues raised therein), because the Order of that court is not a final judgment or decree.

STATEMENT OF THE CASE

The original complaint in the underlying action, *Abdel H. Osman v. Matson Navigation Company, Inc., et al.*, No. 961120, was filed on May 23, 1994, in the Superior Court of the State of California, County of San Francisco. In that complaint and in subsequent amended complaints, plaintiff Osman asserted claims for personal injuries allegedly incurred as a result of shipboard exposure to asbestos products during a lengthy career as a seaman aboard merchant vessels. The original and amended complaints named a total of 82 defendants, including several shipowners on whose vessels Osman had sailed, together with numerous manufacturers of asbestos-containing products and equipment to which Osman allegedly was exposed aboard such vessels.

On January 18, 1995, certain shipowner defendants (real parties in interest on behalf of respondent Superior Court) ("Shipowners")[1] filed a third-party complaint, denominated according to state practice as a "cross complaint," for indemnity and contribution. Among the cross-claim/third-party defendants was petitioner Babcock & Wilcox Company which previously had not been a party to the action. Shipowners asserted that if their vessels were rendered unseaworthy by the presence of asbestos-containing products, resulting in their liability to plaintiff Osman, then they were entitled to indemnity or contribution from the manufacturers of those asbestos products.

On June 26, 1995, petitioner filed a motion for summary judgment or, in the alternative, for summary adjudication. In the motion, petitioner contended that Shipowners' cross-claims/

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1. Matson Navigation Company, Inc., Watters Marine, Inc., Weyerhaeuser Company, Heublein, Inc. (as successor in interest to United Vintners, Inc.), American President Lines, Ltd., and Mobil Oil Corporation.

third-party claims for indemnity and contribution were barred by a release executed by plaintiff Osman in favor of petitioner, citing *McDermott, Inc. v. AmClyde*, 511 U.S. __, 114 S. Ct. 1461 (1994), and *Boca Grande Club, Inc. v. Florida Power & Light Co.*, 511 U.S. __, 114 S. Ct. 1472 (1994).

In response to petitioner's motion, Shipowners argued that genuine issues of material fact precluded entry of summary judgment with regard to both the contribution and indemnity claims and that petitioner was not entitled to judgment as a matter of law on either of those claims.

On August 25, 1995, respondent California Superior Court granted summary adjudication as to the contribution claims but denied the motion as to the indemnity claims. The two-paragraph Order was not accompanied by an opinion or explanation of the basis for the court's ruling.

Faced with a non-final, interlocutory Order denying its motion for summary judgment as to Shipowners' indemnity claims, petitioner sought extraordinary relief from the Court of Appeal of the State of California, First Appellate Division. On September 29, 1995, petitioner filed a petition for peremptory or alternative writ of mandate and for a stay, seeking an order compelling the trial court to reverse its interlocutory Order denying summary judgment on Shipowners' indemnity claims.

The California Court of Appeal denied the petition for writ of mandate on November 22, 1995, in a two-sentence Order which was not accompanied by an opinion. On January 17, 1996, the Supreme Court of California entered a one-sentence Order, also unaccompanied by an opinion, denying petitioner's subsequent petition for review.

No trial date has yet been set in the underlying *Osman* case in California Superior Court, nor has judgment been entered in that underlying action.

REASONS FOR DENYING THE WRIT

I.

THE COURT LACKS JURISDICTION TO REVIEW THE ORDER OF THE CALIFORNIA SUPERIOR COURT (AND THEREBY REACH THE MERITS OF THE GENERAL MARITIME LAW ISSUES), BECAUSE SUCH ORDER IS NOT A FINAL JUDGMENT OR DECREE.

This Court's jurisdiction to review State court cases is limited by 28 U.S.C. § 1257(a) to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had".

Practically all of petitioner's arguments in support of the petition address the merits of the general maritime law issues raised in its summary judgment motion in the underlying state trial court action, *Abdel H. Osman v. Matson Navigation Company, Inc., et al.*, No. 961120 (Cal. Superior Ct.). However, the Order of the California Superior Court in the underlying action is not a "final judgment or decree". That Order simply refused to dismiss Shipowners' cross-claims/third-party claims for indemnity at the pretrial stage. The issues of Shipowners' liability *vel non* to plaintiff Osman, and petitioner's liability *vel non* to Shipowners for indemnity, remain to be decided at a trial which has not yet been scheduled. Thereafter, ordinary appellate review will determine if any judgment requiring petitioner to indemnify Shipowners can stand.

Since the California Superior Court's pretrial Order

denying summary judgment is not a "final judgment or decree" within the meaning of 28 U.S.C. § 1257(a), the Court lacks jurisdiction to review the trial court's order denying petitioner's motion for summary judgment or to reach the merits of the general maritime law issues raised in the trial court.

II.

THE ORDER OF THE CALIFORNIA COURT OF APPEAL IS SUPPORTED BY ADEQUATE AND INDEPENDENT STATE GROUNDS.

Given the posture of this matter, the only "final judgment or decree" within the meaning of 28 U.S.C. § 1257(a) is the Order of the California Court of Appeal which denied extraordinary relief to petitioner. That Order became final upon the California Supreme Court's denial of petitioner's petition for review.

Although petitioner raised issues under general maritime law in its petition for peremptory or alternative writ of mandate in the California Court of Appeal, the Order of the California Court of Appeal denying extraordinary relief is supported by adequate and independent state grounds. When a judgment is supported by adequate and independent state grounds, the Court should not review the case. *Cf. Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (Supreme Court's "jurisdiction fails" if the decision is supported by adequate and independent state grounds).

In California, relief through writ review is extraordinary, discretionary, and "hard to get". *Omaha Indemnity Co. v. Superior Court*, 209 Cal. App. 3d 1266, 1271, 258 Cal. Rptr. 66, 68 (1989). Writ relief is to be used sparingly for reviewing denials of summary judgment motions, with doubts resolved in favor of denial of review. *Roman Catholic Archbishop of San*

Francisco v. Superior Court, 15 Cal. App. 3d 405, 410, 93 Cal. Rptr. 338, 341 (1971).

As Shipowners demonstrated at pp. 2-7 of their Opposition to Petition for Peremptory or Alternative Writ of Mandate and Stay, filed in the California Court of Appeal on October 30, 1995, petitioner failed to satisfy the California state law requirements for issuance of a writ of mandate (*see Omaha Indemnity Co., supra*, 258 Cal. Rptr. at 70):

> First, petitioner had an adequate remedy at law by way of appeal in the event it should be found liable after trial to indemnify Shipowners.
>
> Second, petitioner did not face irreparable injury by being forced to trial on the claims against it, because participation in a trial generally does not meet the definition of "irreparable injury" under California law. *Ordway v. Superior Court*, 198 Cal. App. 3d 98, 101 n.1, 243 Cal. Rptr. 536, 537 (1988).
>
> Third, petitioner had not shown that the trial court abused its discretion in denying petitioner's summary judgment motion as to indemnity. Petitioner acknowledged that its summary judgment motion sought an extension of maritime contribution principles onto the doctrine of indemnity, and federal case law has not established that such extension is proper.
>
> Fourth, petitioner had shown no "unusual urgency" or obvious entitlement to relief sufficient to justify bypassing the normal review process, as required by California law.

Consequently, the Order of the California Court of Appeal is supported by adequate and independent state grounds. Since

state law justified the California Court of Appeal's denial of writ relief, review by this Court of the federal issues raised by petitioner in the California Court of Appeal would amount to nothing more than an advisory opinion. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

III.

THE PRETRIAL RECORD, LACKING A SINGLE WRITTEN OPINION, IS INADEQUATE TO PERMIT CONSIDERATION OF THE UNDERLYING GENERAL MARITIME LAW ISSUES.

Even if it were assumed that the Court has jurisdiction to review the interlocutory order of the California Superior Court or the order of the California Court of Appeal, the present record is inadequate and inappropriate for this Court's consideration of the general maritime law issues raised by petitioner.

The California Superior Court's Order denying petitioner's motion for summary judgment is a non-final, interlocutory order comprised of two paragraphs with no accompanying opinion. Similarly, the California Court of Appeal's Order denying extraordinary relief and the California Supreme Court's Order denying review consist of one or two sentences with no accompanying opinions.

Petitioner seeks to have this Court address issues that remain pending before a State trial court, that have not been decided finally by any court in the proceedings below, and that have not been analyzed in a single written opinion. When distilled to its essence, the petition for certiorari seeks an advisory opinion from this Court — a pretrial pronouncement of how a state trial court should resolve federal issues which await final decision therein. Of course, this Court does not render advisory opinions.

In the propositions of law identified in its petition, petitioner asks this Court to undertake sweeping changes to the general maritime law, including the total abolition of the venerable doctrine of indemnity in all its forms. Should the Court ever choose to consider such issues, it should do so in the context of review of a final judgment in a case with a full and complete record and an opinion that analyzes the law. Sweeping changes to long-established law should not be undertaken in the course of an abstract academic debate in a case that has not yet gone to trial and has no factual record.

The record in this matter simply is inadequate for this Court to address the revolutionary general maritime law issues proposed in the petition.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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